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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GINA DAWN MUNOZ,

Defendant and Appellant.

F075889

(Super. Ct. Nos. BF166208A,
LF010878A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Gregory M. Chappel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Snauffer, J.

A jury convicted appellant Gina Dawn Munoz in the instant case of second degree robbery (Pen. Code, § 212.5, subd. (c)).¹ In a separate proceeding, the court found true three prior prison term enhancements (§ 667.5, subd. (b)), a serious felony enhancement (§ 667, subd. (a)), and allegations that Munoz had a prior conviction within the meaning of the “Three Strikes” law (§ 667, subds. (b)-(i)). Based on her conviction in the instant case, the court found Munoz violated her felony probation in case No. LF010878A for her conviction of residential robbery in concert with others (§§ 664/213, subd. (a)(1)(A)).²

On appeal, Munoz contends: (1) the court erred when it imposed the aggravated term; and (2) her case should be remanded for the trial court to exercise its discretion whether to strike her serious felony enhancement. We affirm.

FACTS

The evidence at trial established that on November 1, 2016, Munoz entered a pharmacy in Bakersfield, concealed several items in her purse and on her person, and was soon joined by a male companion. When confronted by loss prevention agents Michelle Leonard and Deva Johnson, Munoz’s male companion got between her and the agents, allowing Munoz to flee outside and to the back of the store where she picked up a backpack that was in some bushes. When confronted by a manager outside the store, Munoz denied having taken any merchandise and fled to a deli.

After driving with the manager and Johnson to the deli, Leonard entered the store and saw Munoz at a table ripping packaging from the pharmacy’s merchandise and placing the merchandise in a backpack and a purse. As Munoz gathered the merchandise to leave, an item fell on the ground. Munoz attempted to pick it up, but Leonard put her

¹ All further statutory references are to the Penal Code.

² Munoz’s prior strike conviction and her serious felony enhancement were based on her attempted robbery in concert with others conviction in case No. LF010878A.

foot on it. Munoz's male companion pushed Leonard, picked the item up, and walked out of the deli with Munoz.

Leonard called police and followed Munoz and her male companion. As they crossed the street, Munoz's male companion turned and yelled, " 'Eastside Crip. Run up on me and I'm going to kill you.' " Leonard became frightened and ended her pursuit.

The Probation Report and Statement in Mitigation

Munoz's probation report indicates she was 37 years old when she committed the robbery underlying case No. BF166208A and that she had a lengthy criminal record that began in 1999, when Munoz was 20 years old. Her record included nine felony convictions and six misdemeanor convictions, most of them theft-related. She also served four prison terms and although she successfully completed three parole terms, in 2009 she committed a receiving a stolen vehicle offense while on parole, and she violated her probation several times.

As a mitigating circumstance, the report found that Munoz successfully completed three parole terms (Cal. Rules of Court, rule 4.423(b)(6)).³ In aggravation, it found that: (1) Munoz's prior convictions as an adult were numerous (rule 4.421(b)(2)); (2) she served an additional prior prison term in Iowa that was not charged as an enhancement (rule 4.421(b)(3)); (3) she was on two grants of misdemeanor probation and one grant of felony probation when she committed the robbery offense (rule 4.421(b)(4)); and (4) her prior performance on felony probation, on one grant of misdemeanor probation, and during one parole term was unsatisfactory because she failed to abide by the terms of her conditional release and/or she reoffended (rule 4.421(b)(5)). Nevertheless, the report concluded that the underlying robbery was not as serious as other robberies and that Munoz did not personally use force and it recommended the court impose the middle term on Munoz's robbery conviction.

³ All further references to rules are to the California Rules of Court.

On April 18, 2017, defense counsel filed a statement in mitigation citing Munoz's alleged passive participation or minor role in the robbery as a mitigating circumstance. Defense counsel agreed with the probation department's recommendation of the middle term and he asked the court to strike the three prior prison term enhancements.

The Sentencing Hearing

On April 19, 2017, at Munoz's sentencing hearing, the court noted that defense counsel agreed with the recommendation of the middle term and also asked the court to strike the three prior prison term enhancements. Defense counsel then asked the court to strike Munoz's prior strike conviction. The court recited Munoz's lengthy record and asked counsel what justification existed for striking Munoz's strike conviction. Defense counsel responded by asking the court to consider that Munoz suffered from bipolar disorder, depression, and other emotional and mental difficulties. However, after hearing from the prosecutor, the court denied Munoz's motion to strike her strike conviction but did not mention the prior prison term enhancements. The court then heard from the prosecutor, who argued for the aggravated term, and from the probation officer, who submitted on the report.

In explaining its rejection of the middle term, the court recited many of the facts of the underlying robbery and noted that Munoz was complicit in the use of force by her companion and that the robbery was planned. In further comments, defense counsel argued that if you separated Munoz's robbery from the rest of her criminal history, the robbery was not as egregious as others because she was only a coconspirator or an aider and abettor to the robbery and her companion used minimal force to retrieve the merchandise that fell on the floor.⁴

⁴ The prosecution argued that Munoz's companion used force to maintain possession of the stolen merchandise when he pushed Leonard in the deli and he used fear when he threatened Leonard as she attempted to follow them.

After hearing argument from the prosecutor, the court reiterated some of its comments regarding Munoz's record and it cited the following as circumstances in aggravation: (1) Munoz's prior convictions as an adult were numerous; (2) she served a prison term which was not used to enhance her punishment (the Iowa prison term); (3) she was on two grants of probation when she committed the underlying offense; (4) her prior performance on felony probation, on one grant of misdemeanor probation and on one grant of parole was unsatisfactory; (5) Munoz's offense involved planning (rule 4.421(a)(8)); and (6) she acted in concert with another person (rule 4.421(c)). Thus, in concluding that the circumstances in aggravation outweighed the single factor in mitigation, i.e., Munoz's successful completion of three grants of parole (rule 4.423(b)(6)), and imposing the aggravated term, the court stated:

“Unfortunately, I find that in looking at the criminal history, the nature of this case, reviewing my notes and the video[s] [that were introduced into evidence], that she may not have been the one that uttered the words, if you pursue us, I'll kill you, or that she was a criminal street gang member. They're part and complicit, especially in the prearrangement [*sic*]. I mean, the way it appeared to this Court, this was a staged robbery. And I regret, but I find that the upper term would be appropriate.

“And while she did not personally use force against the loss prevention officer, from the size of the gentleman and his actions and the way the two of them worked [*sic*] complicit in the store, exiting the store, and traveling to the deli and what took place in the deli indicates that this was complicit. And it was a similar situation which you had back [in] 2015, where there was a robbery with two or more people in concert of residential robbery [in case No. LF010878A].”

The court then sentenced Munoz in the instant case to an aggregate 18-year term: a doubled, aggravated term of 10 years on her robbery conviction, a five-year serious felony enhancement, and three one-year prior prison term enhancements.

The court next turned to case No. LF010878A, found that Munoz violated her probation in that case based on her robbery conviction in the instant case, and it

sentenced her to a concurrent term of four years six months on her attempted residential robbery conviction in that case. Before going off the record, the court explained to Munoz her right to appeal and right to counsel on appeal.

DISCUSSION

Imposition of the Aggravated Term

Introduction

Munoz appears to contend the trial court violated the rule against the dual use of facts by imposing the aggravated term because it used the following circumstances to support this term: (1) Munoz's probationary status for the conviction underlying her serious felony enhancement; (2) her unsatisfactory performance on a grant of probation for that conviction; and (3) her numerous convictions which included the convictions underlying her serious felony and prior prison term enhancements. Munoz contends she did not forfeit this issue because: (1) defense counsel asked the court not to consider appellant's prior criminal history in making its sentencing choices; (2) the court's emphasis of Munoz's criminal history indicates that any further objection would have been futile; and (3) the court did not give defense counsel a meaningful opportunity to object. We reject these contentions.

Munoz Forfeited the Dual Use of Facts Issue

In *People v. Scott* (1994) 9 Cal.4th 331, the Supreme Court held that a criminal defendant who fails to object to a "trial court's failure to properly make or articulate its discretionary sentencing choices" cannot raise the claim for the first time on appeal. (*Id.* at p. 353.) Forfeited challenges are those that "involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Id.* at p. 354.) The claim that the sentencing court relied on inappropriate factors to impose the aggravated term is a claim that the court "fail[ed] to properly make ... [a] discretionary sentencing choice[]." (*Id.* at p. 353.) However, "there must be a

meaningful opportunity to object to the kinds of claims otherwise deemed [forfeited.]” (*Id.* at p. 356, italics added.)

Defense counsel did not object to the court considering her criminal history or to any of the aggravating circumstances the court cited in imposing the aggravated term on her robbery conviction in case No. BF166208A. Instead, he argued only that if the court did not consider her criminal history, Munoz’s robbery offense was not as egregious as other robberies. Accordingly, we reject Munoz’s contentions that she preserved this issue on appeal by objecting or that any objection would have been futile.

Additionally, defense counsel had ample notice through the probation report and the trial court’s extensive sentencing hearing comments that the court would probably rely on Munoz’s criminal history and the four aggravating circumstances cited in the probation report in determining what term to impose. Further, after the court sentenced Munoz in the robbery case, the hearing continued for a substantial period of time during which the court found that Munoz violated her probation in case No. LF010878A, sentenced her in that case, and advised her of her right to appeal and right to counsel on appeal. Thus, defense counsel also had ample opportunity after the court announced its sentence in the instant case to object to the aggravated term or any of the circumstances the court relied on to impose that term. (Cf. *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1224 [prosecutor not given meaningful opportunity to object when immediately after asking a defendant presumptively ineligible for probation if he accepted conditions of probation, the court immediately declared a recess without hearing from either party].) Accordingly, we conclude Munoz forfeited her challenge to the court’s imposition of the aggravated term on her robbery conviction. However, even if this issue were properly before us, we would reject it.

The Court Did Not Violate the Rule Against the Dual Use of Facts

The decision to impose an upper term rests within the “sound discretion” of the trial court. (§ 1170, subd. (b).) Under section 1170, “the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” (§ 1170, subd. (b).) The “ ‘[i]mproper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.” ’ ” (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Munoz challenges the court’s use of her many prior convictions as a circumstance in aggravation because her prior convictions included the convictions underlying her serious felony enhancement and the three prior prison term enhancements. However, Munoz had five felony convictions and six misdemeanor convictions in addition to the convictions underlying those enhancements. Thus, the court’s reliance on Munoz’s numerous convictions to impose the aggravated term is amply supported by her remaining convictions. (*People v. Hurley* (1983) 144 Cal.App.3d 706, 713; *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [three convictions are numerous within the meaning of rule 4.421(b)(2)].)

Further, probationary status and performance on probation are aggravating factors distinct from prior convictions and prior prison terms. (Cf. *People v. Yim* (2007) 152 Cal.App.4th 366, 369; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1098-1099; see *People v. Towne* (2008) 44 Cal.4th 63, 80 [“service of a prior prison term and the commission of an offense while on probation or parole are, like the fact of a prior conviction, distinguishable from other matters employed to enhance punishment”].) Thus, the court properly relied on Munoz’s unsatisfactory performance on probation and parole and her probationary status when she committed the instant offense to find two

separate aggravating circumstances, even if these circumstances were related to the convictions for which her sentence was enhanced.

Additionally, section 1170, subdivision (b) provides in pertinent part: “the court may not impose an upper term by using the fact of any enhancement *upon which sentence is imposed* under any provision of law[.]” (Italics added.) Since the court did not impose a prior prison term enhancement based on the prison term Munoz served in Iowa, it did not violate the rule against the dual use of facts when it relied on her Iowa prison term to impose the aggravated term.

Moreover, the trial court here found six aggravating circumstances, including three that Munoz does not challenge. Only one circumstance in aggravation is necessary to impose the aggravated term. (*People v. Osband, supra*, 13 Cal.4th at p. 728.) Thus, even if the court improperly relied on one or more of the three circumstances she challenges to impose the aggravated term, the error was harmless.

The Serious Felony Enhancement

Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill 1393), signed into law on September 30, 2018, and effective on January 1, 2019, amended sections 667 and 1385 to give trial courts discretion to strike serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1, 2.) Senate Bill 1393 applies retroactively to cases not yet final on appeal because it lessens potential punishment for certain offenses within the meaning of *In re Estrada* (1965) 63 Cal.2d 740, 745.

The parties agree that Senate Bill 1393 applies retroactively to Munoz because her appeal is not yet final. Munoz, however, contends the matter should be remanded to the trial court for it to exercise its discretion to consider whether to strike her serious felony enhancement. Respondent contends remand is not appropriate because the trial court’s sentencing statements and choices clearly indicate it would not have dismissed the prior serious felony enhancement even if it had discretion to do so. We agree with the parties

that Senate Bill 1393 applies retroactively to Munoz and with respondent that remand is not necessary in the circumstances of this case.

In *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the sole issue was whether “the trial court had discretion to strike the [appellant’s] prior felony conviction in the furtherance of justice under the three strikes law.” (*Id.* at p. 1895.) During the pendency of the appeal, the Supreme Court determined trial courts have such discretion. (*Id.* at p. 1896, citing *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) However, the *Gutierrez* court concluded that “[r]econsideration of sentencing is required under *Romero* where the trial court believed it did not have discretion to strike a three strikes prior conviction, unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.” (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

In *People v. McDaniels* (2018) 22 Cal.App.5th 420 (*McDaniels*), the court adopted this standard for situations where remand for resentencing is required because of a change in the law:

“We see no reason why [*Gutierrez*] would not apply in assessing whether to remand a case for resentencing in light of Senate Bill [No.] 620 [which provided the trial courts with discretion to strike firearm enhancements]. That is, a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*McDaniels, supra*, 22 Cal.App.5th at p. 425.)

In this case, the court found only one circumstance in mitigation and six in aggravation. Further, its comments during sentencing and its denial of Munoz’s motion to strike her prior strike conviction, and its failure to strike even one of her prior prison term enhancements indicate that it would not have stricken Munoz’s serious felony enhancement even if it had believed it had the discretion to strike it. Thus, as in *McDaniels*, “a remand would be an idle act because the record contains a clear indication

that the court will not exercise its discretion in ... defendant's favor.” (*McDaniels, supra*, 22 Cal.App.5th at p. 427.)

Munoz misplaces her reliance on *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*) to argue that remand is appropriate. In *Francis*, a defendant was convicted of possession of marijuana in violation of former Health and Safety Code, section 11530. At the time the defendant was sentenced, that section provided for imprisonment in the state prison for one to 10 years. However, the trial court could have granted probation pursuant to section 1203. (*Francis, supra*, 71 Cal.2d at pp. 69, 75.)

While the case was on appeal, Health and Safety Code section 11530 was amended to provide for alternative sentences of imprisonment in the county jail for up to one year or in the state prison for one to 10 years for a defendant who did not have any prior narcotics offenses. (*Francis, supra*, 71 Cal.2d at p. 75.) The *Francis* court found that the amended statute applied to the defendant because his appeal was not yet final. (*Id.* at p. 79.) In finding remand appropriate, notwithstanding that the trial court had already declined to grant the defendant probation, the *Francis* court stated, “[T]he mere fact that the Legislature changed the offense from a felony to a felony-misdemeanor *conceivably might cause a trial court to impose a county jail term or grant probation* in a case where before the amendment the court denied probation to a defendant eligible therefor and sentenced the defendant to prison.” (*Id.* at p. 77, italics added.)

However, subsequent Supreme Court cases have required more than a conceptual possibility of a more favorable result before a case is remanded for resentencing because of a change in the law. For example, in *People v. Gutierrez* (2014) 58 Cal.4th 1354, two 17-year-old offenders who committed special circumstance murder were sentenced as adults to life without the possibility of parole (LWOP). At the time, section 190.5, subdivision (b) was interpreted to require the trial court to apply a presumption in favor of LWOP. (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1360.) The Supreme Court,

however, overturned decades old case law that established this presumption and held that “section 190.5[, subdivision (b)] confers discretion on the sentencing court to impose either life without parole or a term of 25 years to life on a 16-or 17-year-old juvenile convicted of special circumstance murder, with no presumption in favor of life without parole.” (*Id.* at p. 1387.) In determining that remand for resentencing was required, the court stated:

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) In such circumstances, we have held that the appropriate remedy is to remand for resentencing *unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’* ” (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1391, italics added.)

Accordingly, we conclude *Francis* is not controlling and that remand is not required here because the record clearly indicates the court would not have stricken Munoz’s serious felony enhancement even if when it sentenced her, it had discretion to strike this enhancement.⁵

DISPOSITION

The judgment is affirmed.

⁵ As an example, probation recommended a middle term sentence on the section 212.5, subdivision (c) count, but the court explicitly rejected it and imposed the aggravated term after an exhaustive recitation of the facts and prior record of the defendant.